No. 19-3

In The
Supreme Court of the United States

RYAN BEGAY,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of New Mexico

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "same elements" double jeopardy test of *Blockburger v. United States*, 284 U.S. 299 (1932), should be re-examined in a case involving multiple punishments for crimes involving multiple victims, when the "same conduct" test advocated by petitioner was rejected in *United States v. Dixon*, 509 U.S. 688 (1993). *Dixon* was recently reaffirmed in *Gamble v. United States*, 587 U.S. ___, 139 S. Ct. 1960 (2019), and petitioner cites no case holding that multiple punishments for a unitary act are impermissible when the act causes injury to multiple victims.

2. Whether this Court should review petitioner's contention that due process precludes his conviction for reckless child abuse because he unintentionally shot a child while acting in self-defense, when that argument was not preserved, has not been shown to be an important issue, and rests upon the false premise that the jury found that petitioner acted in self-defense.

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OPINION BELOW

The memorandum opinion of the state court of appeals (Pet. App. 3-36) is not reported and may be found at 2019 WL 643706.

JURISDICTION

The opinion of the state court of appeals was filed on January 16, 2019. The Supreme Court of New Mexico denied review on March 27, 2019. Pet. App. 1-2. The petition for a writ of certiorari was timely filed on June 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On June 26, 2013, petitioner, his girlfriend Sabra Montoya, and Sabra's sister Samantha drove to an apartment building in Albuquerque to buy heroin. Petitioner and his friends then shot up heroin in the parking lot. Pet. App. 4. Sabra's cousin, Carlos ("Trey") Gomez, lived in that building. He came outside and confronted petitioner in the parking lot. Trey's two youngest daughters, Me. G. and Ma. G., followed him out to the parking lot. Trey's 20-month-old niece J.A., who lived with her father in the building, also was in the parking lot. *Id*. at 4-5, 12.

Trey and petitioner had an intense argument. Petitioner, Sabra and Samantha then began driving

away. Sabra was driving and petitioner was in the front passenger seat. They heard noises that they purportedly believed were shots fired at them, but were in fact rocks thrown from Trey's direction. Petitioner then pulled out a gun and fired several shots over the car toward Trey's direction. One shot went through the thigh of 20-month-old J.A. Me. G. and Ma. G. were standing right next to J.A. when the shots were fired. *Id*. at 5, 12.

Sabra drove off with petitioner and Samantha, and petitioner later threw the gun in the river. J.A. was hospitalized for a day. She recovered, but was left with two scars on her thigh. *Id*. at 5, 15.

Petitioner's assertion that there was "no evidence" that "he was aware of the presence of any of the children in the vicinity" is squarely contrary to the record. Pet. 3. The New Mexico Court of Appeals concluded that "a reasonable juror could have found that Defendant was aware that the children were outside the apartment building in the parking lot near Trey – in the zone of danger – when Defendant fired his gun multiple times in Trey's direction." Pet. App. 12-13.

The jury found petitioner guilty of one count of child abuse (recklessly caused, great bodily harm); two counts of child abuse (recklessly caused, no death or great bodily harm); one count of shooting from a motor vehicle (great bodily harm); one count of shooting from a motor vehicle (no injury); and one count of tampering with evidence. *Id*. at 4. The New Mexico Court of Appeals directed the district court to vacate one of the

counts of child abuse (recklessly caused, no death or great bodily harm) on the ground of double jeopardy and otherwise affirmed petitioner's convictions. *Id*. at 21-22, 36.

ARGUMENT

I. This Non-Precedential Decision Does Not Satisfy Any Requirement For Granting A Writ Of Certiorari

The only asserted basis for certiorari is that this case presents "two important federal constitutional questions." Pet. 7. The New Mexico Court of Appeals' decision was an unpublished memorandum opinion. Pet. App. 4. Petitioner does not advise the Court that memorandum opinions are "not precedent" in New Mexico. Rule 12-405(A) NMRA. A decision by an intermediate state appellate court that has no precedential value even in its own state cannot be of sufficient importance that the issues it presents should be "settled by this Court." S. Ct. R. 10(c). For that reason alone, the petition should be denied.

II. This Court Has Conclusively Resolved This Double Jeopardy Issue

In *Blockburger v. United States*, 284 U.S. 299 (1932), this Court set forth a test for determining whether, in cases where a defendant is charged with violating more than one statute based on the commission of the same act, the charges constitute the same

offense for double jeopardy purposes. *Blockburger* stated the test as follows: "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id*. at 304. Petitioner asserts that the *Blockburger* rule should be re-examined because it does not adequately protect individuals against multiple punishments based on a "unitary act." Pet. 23.

Petitioner never specifies which convictions he contends violate the prohibition against double jeopardy. His two child abuse convictions for shooting J.A. and shooting at Me. G. and Ma. G. do not even implicate the *Blockburger* rule because shooting one person and also shooting at two other people does not constitute unitary conduct, and accordingly there is no issue of multiple punishment. The only convictions that implicate the *Blockburger* rule are for shooting from a motor vehicle; petitioner contended below that his convictions for child abuse and shooting from a motor vehicle at the same person constitute the same offense. Pet. App. 24-26.

Petitioner's contention once enjoyed some indirect support. In *Grady v. Corbin*, 495 U.S. 508 (1990), the Court considered the *Blockburger* rule in the context of a double jeopardy claim based on subsequent prosecutions, not multiple punishments. The majority concluded that "a technical comparison of the elements of the two offenses as required by *Blockburger* does not

protect defendants sufficiently from the burdens of multiple trials," and accordingly that "a subsequent prosecution must do more than merely survive the *Blockburger* test." *Id*. at 520-21. The Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id*. at 510.

Four Justices dissented. Justice Scalia's opinion pointed out that the Court had applied the *Blockburger* rule "in virtually every case defining the 'same offense' decided since *Blockburger*." *Id*. at 535-36 (Scalia, J., dissenting).[1] *Accord, Whalen v. United States*, 445 U.S. 684, 691 (1980) (the *Blockburger* rule has been "consistently relied on ever since to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively") (footnote omitted). The Court had "departed from *Blockburger*'s exclusive focus on the statutory elements of crimes in only two situations," both involving successive prosecutions. *Grady*, 495 U.S. at 528 (Scalia, J., dissenting).

Justice Scalia then traced the historical origins of the *Blockburger* rule. Its direct antecedent was *Gavieres v. United States*, 220 U.S. 338, 345 (1911) ("While it is true that the conduct of the accused was

[1] The majority did not disagree that the eight cases cited by Justice Scalia applied the *Blockburger* rule, but noted that they involved "the permissibility of cumulative punishments" instead of "successive prosecutions." *Id*. at 517 n.8.

one and the same, two offenses resulted, each of which had an element not embraced in the other."). But the dissent also provided "a wealth of historical evidence" from the 18th and 19th centuries that "the Double Jeopardy Clause meant what *Blockburger* said." *Grady*, 495 U.S. at 530 (Scalia, J., dissenting). Justice Scalia further concluded that the *Blockburger* rule "best gives effect to the language of the Clause, which protects individuals from being twice put in jeopardy 'for the same *offence*,' not for the same *conduct* or *actions*. 'Offence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'" *Id*. at 529 (citations omitted).

Whatever support petitioner's contention once enjoyed has vanished. Three years later, in *United States v. Dixon*, 509 U.S. 688 (1993), another case involving a double jeopardy claim based on subsequent prosecutions, the Court overruled *Grady*. Justice Scalia's opinion reiterated that the "*Blockburger* analysis, whose definition of what prevents two crimes from being the 'same offence,' U.S. Const., Amdt. 5, has deep historical roots and has been accepted in numerous precedents of this Court." *Id*. at 704. The Court concluded that "[t]he 'same-conduct' rule [*Grady*] announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." *Id*. The petition does not mention either *Grady* or *Dixon*.

Just this past term, this Court reaffirmed *Dixon*. In *Gamble v. United States*, 587 U.S. ___, 139 S. Ct.

1960, 1964 (2019), the Court declined to overrule, on double jeopardy grounds, the rule permitting successive prosecutions by different sovereigns, based on "the Clause's text, other historical evidence, and 170 years of precedent." The Court again stated that the Double Jeopardy Clause "'protects individuals from being twice put in jeopardy "for the same *offence*," not for the same *conduct* or *actions*,'" citing Justice Scalia's "soon-vindicated dissent" in *Grady*, 495 U.S. at 529. *Id*. at 1965. The petition cites the concurring and dissenting opinions in *Gamble*, but ignores the majority's reaffirmation of the central principle on which *Dixon* rejected the departure from the *Blockburger* rule in *Grady*.

In sum, the type of conduct-based double jeopardy test that petitioner advocates was rejected by this Court in *Dixon*, and the *Dixon* rule was very recently reaffirmed. Not only is the *Blockburger* rule 87 years old, but it has repeatedly been followed by this Court and, as petitioner recognizes, by lower federal courts and state courts. Pet. 9-10. In addition, the rule has historical roots going back centuries. Under these circumstances, principles of stare decisis dictate that such a long-standing rule not be re-examined yet again. "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). As shown below, petitioner offers no such justification.

III. There Is No Reason To Re-Examine The *Blockburger* Rule Under The Facts Of This Case

The result reached in this case is not "demonstrably erroneous," much less "wildly unreasonable" or "absurd." Pet. 20, 7, 11. The most salient fact pertaining to the double jeopardy analysis in this case, which the petition ignores, is that petitioner was convicted of multiple offenses because his crime involved multiple victims. The two child abuse convictions do not implicate multiple punishment because they involve three victims, and the two shooting from a motor vehicle convictions also involve three victims. It is indisputable that "[a] defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person." *Neal v. State*, 357 P.2d 839, 844 (Cal. 1960) (Traynor, J.), *disapproved of on other grounds by People v. Correa*, 278 P.3d 809 (Cal. 2012).

Since *Blockburger*, this Court has never questioned the well-established principle that a defendant can be punished multiple times for an act that caused injury to multiple victims. Even the pre-*Dixon* dissenting opinions cited by petitioner did not question this principle. *See Gore v. United States*, 357 U.S. 386, 393 (1958) (Warren, C.J., dissenting) ("murdering two people simultaneously might well warrant two punishments"). Indeed, with the exception of *Missouri v. Hunter*, 459 U.S. 359 (1983), the cases that petitioner cites did not involve multiple victims. In *Hunter*, the

defendant was convicted of robbery and armed criminal action for robbing a store and hitting the manager with his gun, and for assault with malice for shooting at a police officer. *Id*. at 361. The only issue was whether the robbery and armed criminal action convictions violated double jeopardy. The issue of whether two punishments could be imposed for the robbery and the assault on the officer was not even raised.

In *Burleson v. Saffle*, 292 F.3d 1253 (10th Cir.), *cert. denied sub. nom. Burleson v. Ward*, 537 U.S. 1034 (2002), the Tenth Circuit applied the *Blockburger* rule to facts very similar to the facts in the case at bar, and this Court denied review. There, a passenger in a car fired shots at two men, hitting one and leaving him paralyzed, and was convicted on two counts under Oklahoma's drive-by shooting statute. *Id*. at 1254. The Court of Appeals held that, "[b]ecause the legislature intended to allow for multiple convictions in a factual circumstance like that presented in the instant case, Burleson's two convictions for violating the state's drive-by shooting statute did not violate his right against being subjected to double jeopardy." *Id*. at 1256. Petitioner does not cite a single case holding that "multiple punishments for a unitary act" are impermissible when the act causes injury to multiple victims. Pet. 23.

Nor did any of the law review articles cited by petitioner question the principle that a defendant can be punished multiple times for an act that caused injury to multiple victims. The only two articles that mentioned this principle endorsed it. George C. Thomas III,

A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem, 83 Cal. L. Rev. 1027, 1067 n.178 (1995) (agreeing that "the legislature meant to count as many homicides from a single bombing as there are victims"); Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for A Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 364-65 (1956) (making the number of separate offenses turn on the number of persons affected by a defendant's criminal activity "may be appropriate where the legislature has designated the unit of offense in terms of individuals, as would be the case with offenses against the person, such as assault").

The only multiple punishment issue is whether petitioner's convictions for shooting from a motor vehicle constitute the same offense as his child abuse convictions. The New Mexico Court of Appeals applied the *Blockburger* rule and concluded that there was no double jeopardy violation because each of the two statutes "requires proof of a fact that the other does not." Pet. App. 26.

Petitioner essentially stipulates that, under the existing case law, his convictions do not constitute multiple punishment. This Court has recognized that "[l]egislatures, not courts, prescribe the scope of punishments." *Hunter*, 459 U.S. at 368 (footnote omitted). If the legislature intended a cumulative punishment, that is the end of the inquiry. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment

than the legislature intended." *Id*. at 366. *Accord, Ohio v. Johnson*, 467 U.S. 493, 499 n.8 (1984) ("Even if the crimes are the same under *Blockburger*, if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end."); *Albernaz v. United States*, 450 U.S. 333, 344 (1981) ("the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed").

The shooting from a motor vehicle statute is designed to address a distinct social interest: "to protect the public from property damage and personal injury caused by gunfire from a motor vehicle, such as in a drive-by shooting." *State v. Mireles*, 136 N.M. 337, 345, 98 P.3d 727, 735 (N.M. Ct. App. 2004). A vehicle can "meaningfully change[] the nature of the crime" by being "the means through which the defendant is able to pass someone and fire shots quickly and without warning; the vehicle can be cover, or even the means to a quick getaway." *State v. Tafoya*, 285 P.3d 604, 614 (N.M. 2012). The different interests underlying the child abuse and shooting from a motor vehicle statutes indicate a legislative intent to punish these crimes separately.

Petitioner's assertion that the existing law places no meaningful limit on the number of convictions that can arise from a unitary act (Pet. 11) is incorrect. *See* Donald Eric Burton, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 Ohio St. L.J. 799, 810 (1988) (the *Hunter* Court's "deference to the

legislative branch was not total. . . . [T]he Court left the *Blockburger* test intact both as a means of defining 'same offense' and as a tool of statutory construction when a legislature's intent is unclear"). Moreover, New Mexico courts apply "a modified version of the *Blockburger* test for double jeopardy claims involving statutes that are 'vague and unspecific,' in addition to those that are 'written with many alternatives.'" *State v. Gutierrez*, 150 N.M. 232, 250, 258 P.3d 1024, 1042 (N.M. 2011). This test, based on the Sixth Circuit's decision in *Pandelli v. United States*, 635 F.2d 533, 538 (6th Cir. 1980), requires courts to "go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail."

The double jeopardy issue in this case has nothing to do with the proliferation of federal and state crimes. Pet. 15. These are not exotic crimes. Essentially, although the charges were labeled in terms of child abuse, petitioner was convicted for battery and assault – crimes that have been prohibited for centuries – in the context of child victims.

Petitioner does not even attempt to explain why multiple punishments are inappropriate in a case involving multiple victims. Nor does he suggest any viable rule to replace the *Blockburger* rule in this context. To hold that multiple punishments for a unitary act are impermissible would mean, for example, that a person who drives a car into a crowd and injures five people could be punished for only one crime. Petitioner

cites no case that has even suggested that result. Nor is there any constitutional basis to attempt to limit the charges that the prosecution can file in the first instance. The Double Jeopardy Clause "may protect a petitioner against cumulative punishments for convictions on the same offense," but it "does not prohibit the State from prosecuting" a person for "multiple offenses in a single prosecution." *Johnson*, 467 U.S. at 500. "This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case." *Ball v. United States*, 470 U.S. 856, 859 (1985).

In sum, none of the criticisms of the *Blockburger* rule cited in the petition have anything to do with a case such as this, where the defendant received multiple punishments because he harmed multiple victims.

IV. Petitioner's Due Process Claim Was Not Preserved, Is Not Important, And Is Based On A False Premise

Petitioner argues that due process precludes a conviction for reckless child abuse because he unintentionally shot a child while acting in self-defense. This claim does not warrant this Court's review for three reasons.

First, the argument was not preserved. Petitioner stakes his claim of preservation on the New Mexico Court of Appeals' observation that he "contended 'that the child abuse convictions violate due process rights.'"

Pet. 5-6. This is an obfuscation. The cited portion of the opinion refers to petitioner's claim that the applicable child abuse statute failed to put him on notice that his conduct was illegal. Pet. App. 16. That argument is plainly distinct from the one before this Court. Petitioner's present argument was actually made to the court below as an "inconsistent verdict" claim. He rested this argument not on the Due Process Clause, but on a civil decision, *Hundley v. District of Columbia*, 494 F.3d 1097 (D.C. Cir. 2007). *Hundley*, in turn, relied on Fed. R. Civ. P. 49(b). *Id*. at 1102. Rule 49 permits a court to direct the jury to answer special interrogatories and specifically provides remedies for answers inconsistent with general verdicts. This rule has no constitutional dimension and no criminal law parallel.

Even if petitioner had preserved his due process claim, his argument still fails. This Court has consistently held that a "criminal defendant convicted by a jury on one count [cannot] attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count." *United States v. Powell*, 469 U.S. 57, 58, 63-64 (1984) (citing *Dunn v. United States*, 284 U.S. 390, 393-94 (1932)). *See also Harris v. Rivera*, 454 U.S. 339, 348 (1981) (applying the rule to inconsistent verdicts in a state bench trial in a habeas corpus proceeding); *United States v. Dotterweich*, 320 U.S. 277, 279 (1943) (applying the rule to the inconsistency between a conviction of the president of a corporation and an acquittal of the corporation for the same offense). In deciding a claim premised specifically on due process, this Court held that inconsistent verdicts in a

state criminal proceeding did not "create a constitutional defect in a guilty verdict that is supported by sufficient evidence and is the product of a fair trial." *Harris*, 454 U.S. at 344.[2] Thus, under this Court's controlling case law, petitioner's due process claim fails.

Second, petitioner does not even attempt to show that this issue is sufficiently important to warrant this Court's review.

Third, petitioner's claim is based upon the false premise that there was a finding that he acted in self-defense. There was no special interrogatory asking the jury to determine whether he acted in self-defense. Without such an interrogatory, courts cannot know the reason for an acquittal because a jury has an "unreviewable power" to "return a verdict of not guilty for impermissible reasons." *Harris*, 454 U.S. at 346 (footnote omitted). *Accord, State v. Leyba*, 80 N.M. 190, 195, 453 P.2d 211, 216 (N.M. 1969) ("we can only speculate that the jury found defendant did not commit an assault"; the jury may have acquitted him "for any number of reasons. . . . Defendant's guilt of assault may

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[2] Petitioner does not allege any procedural defect in the proceedings against him, but briefly veers into a discussion of sufficiency. Pet. 28-29. As this Court observed in *Powell*, 469 U.S. at 67, a sufficiency of the evidence review serves as an independent check "against jury irrationality or error." A sufficiency review "should not be confused with the problems caused by inconsistent verdicts." *Ibid*. But the existence of this review makes further safeguards against inconsistent verdicts unnecessary. *Ibid*. Petitioner's failure to petition this Court for review of the sufficiency of the evidence amounts to a concession that the evidence was adequate.

have been plain and the jury may have refused to convict in defiance of reason. . . . [T]he jury is answerable only to conscience"). And even if there had been such a finding, petitioner makes no showing that it would apply to the child victims as well as to his charge involving Trey.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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